Supreme Court, U.S.
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No. 04-

In The

Supreme Court of the United States

OCTOBER TERM 2004

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JONATHAN WAGNER,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Was petitioner's sentence unconstitutionally enhanced based on facts found by a judge instead of a jury?

List of Parties

Petitioner was indicted with Daniel Hernandez, Edwin Deleon, Melvin Maisonave, Raul Sanchez, Richard Moreno and Jose Pastrana. He was tried with all those individuals except Pastrana and Sanchez.

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No. 04A485

In The

Supreme Court Of The United States

October Term, 2004

JONATHAN WAGNER,

Petitioner,

– against –

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Jonathan Wagner respectfully prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit, affirming an enhanced sentence based on facts not found by a jury.

Opinion Below

The Court of Appeals' unpublished opinion, *United States v. Wagner*, No. 02-1287(L) *et al.*, 103 Fed. Appx. 422, 2004 WL 134117 (2d Cir. June 15, 2004), appears at 1a.[1]

Jurisdiction

This Court has jurisdiction under 28 U.S.C. § 1254(1). After the Second Circuit denied Wagner's rehearing petition on Sept. 17, 2004, this Court extended the deadline for his *certiorari* petition to Feb. 14, 2005. This petition timely follows.

Constitutional and Statutory Provisions

The principal provision involved in this petition is U.S. CONST. AMEND. VI, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

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[1] Numbers followed by "a" refer to pages of the Appendix to this petition. Numbers preceded by "A:" refer to pages of the Joint Appendix in the Court of Appeals. Numbers preceded by "T:" refer to pages of the trial transcript not included in the Joint Appendix.

Jurisdiction in the District Court

The United States District Court for the Eastern District of New York (Raggi, J.) had jurisdiction under, *inter alia*, 18 U.S.C. § 3231.

Statement of the Case

A jury convicted Wagner of RICO, narcotics and Hobbs Act violations. After a lengthy trial, it found, by special verdict, that the charged "conspiracy" involved "one kilogram or more" of heroin. (A: 40, 42, 44) Under 21 U.S.C. § 841(b)(1)(A), that finding mandated a sentence of 10 years to life imprisonment.

At sentencing, the District Court made its own factual findings and imposed a life sentence under the federal Sentencing Guidelines, calculated as follows:

A. Based on its own assessment of the trial evidence, the Court estimated that the conspiracy involved some **30-100 kilograms of heroin**. This determination boosted Wagner's presumptive offense level from **32** to **38** under U.S.S.G. § 2D1.1, a **six point** increase. (A: 109-14, 128-32)[2]

B. Pursuant to U.S.S.G. § 3B1.1, the Court added **four points** for Wagner's purported leadership role, hiking the adjusted offense level to **42**. (A: 115, 130, 132, 136, 138, 164)

C. Pursuant to U.S.S.G. § 2D1.1(b)(1), the Court

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[2] The Drug Quantity Table at U.S.S.G. § 2D1.1(c)(4) provides a base level of 32 for one kilogram of heroin, the only amount specifically submitted to or found by the jury. In contrast, § 2D1.1(c)(1) punishes 30 or more kilograms at level 38.

added another **two points** for alleged firearm possession, pushing the adjusted offense level to **44**. (A: 132)

D. Finally, the Court added a **two point** multiple count adjustment, pursuant to U.S.S.G. § 3D1.4, yielding a combined offense level of **46**. (A: 136)

E. In Wagner's Criminal History Category of I, offense level 46 – indeed **any** offense level over 42 – dictates life imprisonment. (A: 136, 160)

Relying on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), Wagner pointedly objected to the use of facts not found by the jury to enhance the presumptive base offense level above 32. While recognizing that controlling precedent – *United States v. Norris*, 281 F.3d 357 (2d Cir. 2002) – then "foreclose[d]" his position, Wagner took pains to preserve it for "potential Second Circuit or Supreme Court review." (17a) To this end, defense counsel maintained:

> *Norris* I believe forecloses the application of *Apprendi* as a matter of Second Circuit precedent. For the record, however, I did want to point out several [observations] in *Norris* which I am sure your Honor has taken due note of.
>
> The argument was termed not frivolous by the *Norris* court and it was also pointed out in *Norris* that at least four Supreme Court justices currently support the view that *Apprendi* should apply to guideline range calculations, *i.e.* that **the presumptive guideline sentence is the equivalent of the statutory maximum**.
>
> There are three cases that I'm aware of

pending before the Supreme Court this term, [] *Harris*, the *Cotton* case and the *Ring* case that may well resolve this issue....[3] So I did want to preserve for purposes of potential Second Circuit or Supreme Court review the argument that A) the presumptive guideline range, which for Mr. Wagner in this case I believe would be 32, if you were just going by the – I understand your Honor gave a special verdict in the case and there's a one-or-more-kilogram finding.

In the absence of the drug quantities that the Probation Department is seeking to attribute to Mr. Wagner, you would have I believe a 32 range, but with the quantities they're trying to attribute I believe it's 36 or 38. So if *Norris* is overruled, either *sub silentio* or explicitly by these Supreme Court [cases], we've got I believe a four-to six-level swing there. So I wanted to preserve that issue in light of these three pending Supreme Court cases this term.

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[3] *See Harris v. United States*, 536 U.S. 524 (2002); *United States v. Cotton*, 535 U.S. 625 (2002); *Ring v. Arizona*, 536 U.S. 584 (2002). As it turned out, these cases never reached Wagner's contentions that (a) **all** Guidelines enhancements implicate the Sixth Amendment jury trial right, and (b) the presumptive sentencing range **is** the "statutory maximum" for *Apprendi* purposes. *See* 535 U.S. at 490 ("any fact," other than the fact of a prior conviction, that "increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"). But this Court **did** reach those claims – substantially adopting Wagner's view – in later terms.

16a-18a (emphasis supplied).

To punctuate his *Apprendi* argument, Wagner and codefendant Daniel Hernandez unsuccessfully sought an evidentiary hearing, pursuant to U.S.S.G. § 6A1.3 (Policy Statement) and *United States v. Fatico*, 603 F.2d 1053 (2d Cir. 1979), on the disputed sentencing issues in general and drug quantity in particular. (A: 89-91, 100-28)

Collectively, the enhancements imposed on the Court's own findings had a startling effect on Wagner's term of confinement. Specifically, **they swelled his presumptive sentence from just 121-151 months at level 32, or roughly 10-12.5 years, all the way up to life in prison** – an increase of epic proportion.

On appeal, codefendant Hernandez – expressly joined by Wagner pursuant to Fed. R. App. P. 28(i) – asserted both the *Apprendi* and *Fatico* claims at some length. *See, e.g.*, Hernandez Opening Brief at **POINTS X-XI**; Wagner Opening Brief at **POINT V**. Wagner also renewed his objection to the four point role adjustment. *See* Wagner Opening Brief at **POINT IV**. The Second Circuit rejected all three arguments with little or no substantive discussion. (1a-14a) It adhered to its ruling on Wagner's rehearing petition, relying on Circuit precedent holding the intervening decision in *Blakely v. Washington*, 124 S. Ct. 2531 (2004), inapplicable to the federal Sentencing Guidelines. (22a-24a) This petition ensues.

REASONS FOR GRANTING THE PETITION

I. *UNITED STATES V. BOOKER* INVALIDATES WAGNER'S SENTENCE

In *United States v. Booker*,[4] this Court expressly extended *Blakely*'s holding – that the Sixth Amendment forbids judicial sentence enhancements based on facts neither admitted by the defendant nor found by a jury – to the federal Sentencing Guidelines. Performing a severability analysis, the Court relieved this constitutional infirmity by declaring the Guidelines advisory rather than mandatory. Wagner's sentence clearly violates *Booker*.

In *United States v. Crosby*,[5] the Second Circuit announced a uniform remedy for *Booker* violations within its jurisdiction. Relying on 18 U.S.C. § 3742(f), *Crosby* held that in "most" cases involving "pre-*Booker/Fanfan* sentences pending on direct review," the "generally appropriate" remedy

> will be a remand to the district court, not for the purpose of a required resentencing, but only for the more limited purpose of permitting the sentencing judge to determine **whether** to resentence, now fully informed of the new sentencing regime, and if so, to resentence.

2005 WL 240916, at *11, *13.

In making this determination – "whether to resentence"

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[4] 125 S. Ct. 738 (2005).

[5] No. 03-1675, _ F.3d _, 2005 WL 240916 (2d Cir. Feb. 2, 2005).

– district courts are to evaluate "whether the original sentence would have been nontrivially different under ... *Booker/Fanfan*" principles, based "solely on the circumstances that existed at the time." *Id.* at *11 n.19, *13. Notably, the Court's remedy covers **all** *Booker* errors alike – both preserved and unpreserved. *Id.* at *13.

Under *Crosby*, then, this case should be remanded to the district court to determine whether to resentence Wagner or, at a minimum, to the Court of Appeals to direct such a remand.

CONCLUSION

This petition should be granted.

Respectfully submitted,

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On the Petition:
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**Counsel of Record*

No. 04-

In The
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OCTOBER TERM 2004

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JONATHAN WAGNER,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

APPENDIX

Appendix A – Summary Order of The United States Court of Appeals for the Second Circuit [Pages 1a – 14a]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 15th day of June, two thousand four.

PRESENT:

HON. AMALYA L. KEARSE,
HON. SONIA SOTOMAYOR,
Circuit Judges,

HON. LAURA TAYLOR SWAIN,
District Judge.[*]

UNITED STATES OF AMERICA,
Appellee,

v.

JONATHAN WAGNER, DANIEL HERNANDEZ, RICHARD MORENO,
Defendants-Appellants.

No. 02-1287 (L)
No. 02-1288 (CON)
No. 02-1507 (CON)

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[*] The Honorable Laura Taylor Swain, of the United States District Court for the Southern District of New York, sitting by designation.

APPENDIX A
[Summary Order of The USCA For The Second Circuit]

For Appellant Wagner:	MARC FERNICH, Law Office of Marc Fernich, New York, New York.
For Appellant Hernandez:	PHILIP KATOWITZ, Brooklyn, New York.
For Appellant Moreno:	BARRY GENE RHODES, Brooklyn, New York.
For Appellee:	CHRISTINA DUGGER, Assistant United States Attorney for the Eastern District of New York (Roslynn R. Mauskopf, United States Attorney for the Eastern District of New York, *on the brief*; Susan Corkery, Assistant United States Attorney for the Eastern District of New York, *of counsel*), Brooklyn, New York.

UPON DUE CONSIDERATION of this appeal from a judgment entered in the United States District Court for the Eastern District of New York (Raggi, J.), it is hereby ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is AFFIRMED.

Defendants-appellants Jonathan Wagner, Daniel Hernandez, and Richard Moreno, in connection with their participation in the affairs of the "Woodbine Crew," a group based in the Bushwick section of Brooklyn, were convicted, following a five-week jury trial, of conducting and conspiring to conduct a racketeering enterprise, in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1962(c) &

(d), and various counts of robbery and conspiracy to rob, in violation of the Hobbs Act, 18 U.S.C. § 1951. Wagner and Hernandez also were convicted of conspiracy to distribute heroin, in violation of 21 U.S.C. §§ 841(b)(1)(A) and 846. The district court sentenced Wagner and Hernandez principally to concurrent terms of life imprisonment, and Moreno principally to a 315-month prison term to run concurrently with a 75-year state sentence imposed previously for armed robbery. On appeal, defendants challenge the sufficiency of the evidence supporting certain of their convictions and several pretrial and trial rulings made by the district court. Wagner and Hernandez also challenge their sentences.

1. Sufficiency-of-the-Evidence Challenges

Sufficiency-of-the-evidence challenges will be rejected "if, after viewing the evidence in the light most favorable to the prosecution, the . . . court finds that *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Coonan*, 938 F.2d 1553, 1559 (2d Cir. 1991) (emphasis in original; citation and internal quotation marks omitted). All reasonable inferences from the evidence presented at trial must be drawn in favor of the Government. *Id.*

First, Wagner argues[1] that the Government failed to prove the existence of a RICO enterprise because, he maintains, it presented no evidence of an enterprise distinct from the alleged predicate acts, and, further, the predicate acts alleged were nothing more than a discontinuous series of individual crimes. Neither of these arguments has merit. Contrary to Wagner's first argument, neither the Supreme Court nor this Court has required that the Government's proof of the alleged enterprise be distinct from the

[1] Moreno and Wagner join in the arguments of their codefendants pursuant to Fed. R. App. P. 28(i).

racketeering conduct. *See, e.g., United States v. Turkette*, 452 U.S. 576, 583 (1981) (holding that while both the "enterprise" and "pattern of racketeering" elements must each be proven, "the proof used to establish these separate elements may in particular cases coalesce"); *United States v. Indelicato*, 865 F.2d 1370, 1383-84 (2d Cir. 1989) (*en banc*) ("[T]he difference in the nature of the [pattern and enterprise] elements does not mean that the same piece of evidence may not help to establish both."). Even assuming *arguendo* that distinct proof were required, our review of the record shows that the Government offered evidence beyond the charged predicate acts to prove the existence of the enterprise, such as evidence concerning the Crew's genesis, its leadership, and tools contributed by Crew members and shared to accomplish the Crew's goals. Concerning Wagner's second contention, the evidence shows that the activities of the Crew, drug dealing and committing robberies, established a connected pattern of the defendants' use of criminal activity to make money. While some of the robberies were committed in part to support the drug dealing, ultimately both were done to make money for the enterprise.

Second, Moreno challenges the sufficiency of the evidence concerning his RICO convictions because, he asserts, the Government's evidence concerning his role in the enterprise was limited to certain robberies that did not affect interstate commerce. Moreno contends that "he cannot be held accountable for racketeering when the interstate effect of the enterprise's activities had nothing to do with his own behavior." This argument is unavailing, however, because under RICO only the activities of the *enterprise*, rather than the activities of any one particular actor, must affect interstate commerce. *See* 18 U.S.C. § 1962(c) ("It shall be unlawful for any person employed by or associated with *any enterprise engaged in, or the activities of which affect, interstate or foreign commerce*, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." (emphasis

added)). Further, the definition of "racketeering activity" does not impose a requirement that the illicit act affect interstate commerce. *See* 18 U.S.C. § 1961(1)(A) (defining racketeering activity to include "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year"). Because an interstate nexus requirement is not an element of any one of the predicate acts here chargeable under New York law, *see* New York Penal Law §§ 160.15, 105.10, 20.00, the government was not required to put forth any evidence of such. In any event, the evidence showed that Moreno was involved in at least two robberies or robbery conspiracies – the conspiracy to rob "Everlast" and the robbery of Vasilios Lazarides – that were connected to the narcotics enterprise and therefore linked to interstate commerce. *See United States v. Vasquez*, 3 267 F.3d 79, 90 (2d Cir. 2001) ("Engaging in narcotics trafficking affects *interstate* commerce, at the very least, regardless of where the raw materials originate." (emphasis in original)).

Third, Hernandez and Moreno challenge the sufficiency of the evidence concerning their involvement in three predicate RICO acts. These challenges are unavailing. Hernandez and Moreno first contend the evidence was insufficient to prove their involvement in a conspiracy to rob Everlast because, they contend, the agreement never ripened into an overt act as required under New York state law. We reject this challenge because there was sufficient evidence to prove that the discussions had moved beyond the "cementing of the agreement itself," and into the planning stage, which included the sharing of intelligence, delegation of duties, and instruction on obtaining "the implements of the crime." *People v. Menache*, 98 A.D.2d 335, 337-38 (N.Y. App. Div. 2d Dep't 1983). Specifically, Hernandez had obtained the whereabouts of Everlast; Hernandez told Sanchez to obtain a police-type vehicle for the robbery;

Hernandez, Moreno and Sanchez discussed how to catch Everlast off guard and threaten him and his wife with death; and Hernandez determined and instructed the others that the day of the robbery would be Sunday, March 28, 1999. Thus, the conversations had evolved into discussions of the mechanics of the robbery and the delegation of acts in furtherance of it, thereby satisfying the overt act requirement under New York law.

Next, Hernandez argues that the Government did not prove that the robbery of John Romero was connected to the RICO enterprise. The record evidence shows, however, that a rational juror could have concluded that the robbery was connected. Romero was a rival drug dealer, whom Hernandez robbed when Romero and Silva, another rival drug dealer, were engaging in a drug deal with customers from New Jersey, the origin of several of the Woodbine Crew's customers. Hernandez and others in the Crew applied tactics used in other robberies of drug dealers, such as in the Gilberto Estrada robbery and as planned for the Everlast robbery: they pretended to be police. Although Hernandez claims that the robbery was to recover a debt owed by Romero to Hernandez's uncle, the egregiousness of the robbery and wounds inflicted upon Romero were disproportionate to the amount owed (approximately $1,000). Additionally, the robbery was not just of Romero; Silva was also robbed.

Further, Moreno claims that the evidence was insufficient to prove his involvement in the robbery of Vasilios Lazarides because no witness identified him as having participated. He cites the inconsistent verdicts[2] as support for his insufficiency-of-the-

[2] The jury found that the government had not proven, as a predicate act under the RICO conduct charge, that Moreno was involved in the conspiracy to rob, or actual robbery of, Lazarides. As a predicate act under the RICO conspiracy charge, however, the jury found that the government had proven that Moreno was involved in the actual robbery of Lazarides.

evidence claim. First, the inconsistent verdicts rendered concerning the Lazarides robbery are not a ground for granting a sufficiency-of-the-evidence challenge. *See United States v. Powell*, 469 U.S. 57, 65-66 (1984). Second, having reviewed the evidence, we find his argument unavailing. Lazarides's wife, who was present outside of the apartment building the day that Lazarides was robbed, provided a highly detailed description of Moreno's race, gait and height. Her description was corroborated by the testimony of Lazarides, testimony describing similar features of other robberies, and Moreno's physical appearance and prosthetic leg. Thus, the evidence was sufficient to permit a rational juror to conclude that Moreno was involved in the robbery of Lazarides. *See Coonan*, 938 F.2d at 1559.

Fourth, Hernandez and Moreno raise two sufficiency-of-the-evidence challenges regarding their convictions under the Hobbs Act for conducting and conspiring to engage in robberies. Hernandez and Moreno contend that the evidence concerning the conspiracy to rob, and the robberies of, Ara Hagopian and Mary Macchioni was legally insufficient because the Government failed to prove a nexus to interstate commerce. Evidence at the trial, however, showed that Hagopian and Macchioni were targeted specifically because of their ownership and management of a catering hall that was engaged in interstate commerce, and that the cash proceeds stolen from Hagopian were generated by and for use in connection with the operation of the catering hall. Such a connection is sufficient to establish the interstate nexus element of the offense. *Cf. United States v. Wilkerson*, 361 F.3d 717, 730-31 (2d Cir. 2004) (affirming attempted robbery conviction where defendants conspired to rob the victims' landscaping business, which purchased supplies from an in-state retailer that obtained its goods from out-of-state wholesalers, and where the theft, had it been accomplished, would have deprived the business of monies to be used to purchase goods that traveled in interstate commerce).

APPENDIX A
[Summary Order of The USCA For The Second Circuit]

Next, Hernandez argues that the government failed to prove an interstate nexus with respect to the Everlast robbery conspiracy. A conspiracy conviction under the Hobbs Act need be supported only by evidence of a potential, and not an actual, effect on interstate commerce, however. *United States v. Shareef*, 190 F.3d 71, 75 (2d Cir. 1999). Here, the government presented evidence that Hernandez intended to rob Everlast, a narcotics dealer, of his substantial narcotics trafficking proceeds. Narcotics trafficking affects interstate commerce. *See* Controlled Substances Act, 21 U.S.C. § 801(3)(B); *Vasquez*, 267 F.3d at 90. Consequently, this claim is unavailing.

Finally, Hernandez argues that the "evidence of [his] involvement in the charged narcotics conspiracy falls short of what is required." We reject this contention based on our review of the record. Testimony was presented that Hernandez was involved in the drug conspiracy since the initial merger with Carlos "Charlie" Villanueva. In November of 1992, Hernandez and other crew members violently robbed Elvin Sanchez to "enhance [Hernandez's drug] business." Moreover, a witness testified that he saw Hernandez with another crew member who was passing out samples of "Gotta Have It" heroin in front of a rival drug dealer's drug spots. That testimony was corroborated by another witness who testified that he saw Hernandez handing out samples of heroin on four or five occasions during the period from 1993 to 1995. Gabriel "Bobby" Rodriguez also testified that after the agreement with Villanueva was made, Rodriguez often saw Hernandez, Wagner and some heroin customers when he picked up "Gotta Have It" heroin. Moreover, testimony was received regarding Hernandez's delivery of brown paper bags to Villanueva's sister Bernice while complaining about Villanueva's treating people like "kids." This evidence, when viewed in the light most favorable to the Government and together with other evidence that paper bags were used to make payments, supports the inference of Hernandez's involvement in the narcotics conspiracy. Finally, the

evidence was sufficient to permit the jury to find that Hernandez's participation in the violent robberies of Romero, delinquent on a drug debt, and Sanchez, a rival drug dealer, served to increase Hernandez's reputation in the drug community, to collect on monies owed, or to strengthen the narcotics business. On this evidence, a rational juror could have found Hernandez's participation in the narcotics conspiracy proven beyond a reasonable doubt. *See Coonan*, 938 F.2d at 1559.

2. Challenges to Pretrial Rulings

Hernandez contends that he is entitled to a new trial because of two erroneous pretrial rulings made by the district court. We review challenges concerning the admission of evidence for abuse of discretion, *see United States v. Jones*, 299 F.3d 103, 112 (2d Cir. 2002), the trial court's findings of fact for clear error, and its conclusions of law *de novo*, *see Am. Banana Co. v. Republic Nat'l Bank of N.Y., N.A.*, 362 F.3d 33, 40 (2d Cir. 2004).

First, Hernandez argues that the evidence of the pretrial identifications made by Sanchez, Romero and Rodriguez should have been suppressed because the photo arrays and spreads used in those identifications were unduly suggestive. "Identification evidence must be suppressed if the display was so unnecessarily suggestive and conducive to irreparable mistaken identification that [the defendant] was denied due process of law." *United States v. Jakobetz*, 955 F.2d 786, 803 (2d Cir. 1992) (internal quotation marks omitted). It is worth noting that Hernandez was identified not just by Sanchez, Romero, and Rodriguez, but also by two people who already knew him – Prosper and Lopez. We conclude that the district court's factual findings that the photo arrays and photo spread book were not suggestive or conducive to mistaken identification were not in error. The district court therefore did not abuse its discretion in admitting testimony concerning the identifications.

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Last, Hernandez asserts that several defects were present in the search warrant and resulting search of his apartment, and thus that the items recovered during the search should have been excluded at trial. Specifically, he argues that the affidavit in support of the warrant did not show probable cause, that the warrant was facially deficient, and that the items seized exceeded the scope of the warrant. We reject each of these contentions. The application for the search warrant sufficiently articulated grounds for probable cause because it stated that Hernandez had firearms in his apartment and that he was planning to engage in a violent robbery of a drug dealer to be committed the following day. The government also provided evidence of the reliability of the confidential informants. Further, the warrant contained an adequate description of the premises, such that "the officer[] armed with [the] search warrant [could] with reasonable effort ascertain and identify the place intended," *Velardi v. Walsh*, 40 F.3d 569, 576 (2d Cir. 1994) (citations and internal quotation marks omitted), and, although the warrant misidentified the actual number on the apartment, that fact alone does not invalidate the warrant where the warrant described the premises as known after reasonable investigation, *see Maryland v. Garrison*, 480 U.S. 79, 85 (1987). Finally, the items seized and admitted into evidence fell within either the scope of the warrant or the plain view doctrine. See United States v. $557,933.89, More or Less, In U.S. Funds, 287 F.3d 66, 81-82 (2d Cir. 2002).

3. Challenges to Trial Rulings

Defendants argue that a new trial is warranted based on several assertedly erroneous rulings made at trial.

First, defendants challenge the district court's refusal to permit them to attack the credibility of Sanchez, a government cooperator, with taped conversations between Sanchez and his

sister. Sanchez, however, did not testify at trial, and the district court explicitly instructed the jury that the statements of Sanchez contained in other tape recordings between Sanchez and defendants entered into evidence were not admitted for their truth, but for the context of defendants' statements contained therein. Because the admitted statements were not hearsay, Sanchez's credibility was irrelevant, and Rule 806 of the Federal Rules of Evidence therefore did not apply. *See* Fed. R. Evid. 806 (permitting impeachment of declarant when hearsay statement admitted in evidence); *United States v. McGowan*, 58 F.3d 8, 15-16 (2d Cir. 1995).

Second, Wagner and Hernandez contend that the district court should have provided a missing witness charge as to Sanchez. Given all the attendant facts and circumstances, however, we conclude that it was well within the district court's discretion to refuse such a request. *See United States v. Rollins*, 487 F.2d 409, 412 (2d Cir. 1973) (holding that, in considering witness availability, court should review "all the facts and circumstances bearing upon the witness's relation to the parties, rather than merely on physical presence or accessibility"). Defense counsel requested the charge only after closing its case, on the ground that Sanchez's attorney had not returned counsel's phone call. The court noted that counsel had failed to make an application to interview Sanchez and invited counsel to call Sanchez as a witness, which invitation counsel declined. The court also permitted counsel to argue that an adverse inference could be drawn from Sanchez's absence. Under these circumstances, the trial court acted well within its discretion. See *United States v. Torres*, 845 F.2d 1165, 1170-71 (2d Cir. 1988).

Third, Hernandez and Moreno argue that they should have been permitted to cross-examine Leslie Prosper concerning the identities of the victims involved in Prosper's rape, sodomy and witness-intimidation convictions. Although the particular information may have been somewhat relevant to Prosper's

credibility, we conclude that the questions asked and observations made by Judge Raggi were pertinent to an analysis under Rule 403 of the Federal Rules of Evidence, and find that her decision to deny admission of these victims' identities was not an abuse of discretion.

Fourth, Wagner claims that much of the evidence supporting the RICO charges was admitted improperly as a result of "faulty RICO charges" and a joint trial, thereby causing an unfairly prejudicial spillover effect. This argument is unavailing, however, because the evidence was sufficient to affirm the RICO convictions. Further, the evidence against Wagner, who was involved in drug dealing and some of the most brutal of the robberies, was not, as Wagner asserts, "significantly [less] arousing" than, or "qualitatively different from," the evidence implicating his codefendants.

4. Sentencing Challenges

Wagner and Hernandez challenge certain decisions made by the district court in sentencing them. First, Wagner argues that the district court improperly enhanced his base sentencing level by a four-point leadership role adjustment under U.S.S.G. § 3B1.1. This claim is unavailing. Prior to imposing an offense-role enhancement, the sentencing court must make factual findings "that the defendant was 'an organizer or leader,' and . . . that the criminal activity either involved five or more participants or was otherwise extensive." *United States v. Zagari,* 111 F.3d 307, 330 (2d Cir. 1997) (internal quotation marks omitted). At the sentencing hearing, Judge Raggi found that "[Wagner] was the leader of this crew . . . I have to say that I was left at trial with absolutely no question that the heroin dealing of the Woodbine crew was entirely under the supervisio[n] of Mr. Wagner." Based on our review of the record, we conclude that these factual findings were well supported and thus find no error in the sentencing court's

leadership role adjustment. The fact, as Wagner maintains, that Villanueva and others also may have been leaders does not displace Wagner's proven leadership role.

Second, Hernandez argues that the district court erred in determining the quantity of drugs for which he was accountable without first holding a hearing pursuant to *United States v. Fatico*, 579 F.2d 707 (2d Cir. 1978). This argument is meritless. When disputes arise concerning factual matters important to the sentencing determination, the "procedures to be adopted for resolution of such disputes lie within the sound discretion of the sentencing judge." *United States v. Berndt*, 127 F.3d 251, 257 (2d Cir. 1997). Further, when a district court for sentencing purposes estimates the amount of drugs involved in a crime in the absence of a drug seizure, that estimate need only be established by a preponderance of the evidence. *See United States v. Prince*, 110 F.3d 921, 925 (2d Cir. 1997). The district court in estimating that amount may rely on any information available to it, including evidence that would not be admissible at trial, see U.S.S.G. § 6A1.3(a) (1998), so long as it relies on "specific evidence – e.g., drug records, admissions or live testimony." *United States v. Shonubi*, 103 F.3d 1085, 1089 (2d Cir. 1997) (emphasis and internal quotation marks omitted). The district court properly reviewed the evidence presented at trial in making its quantity estimation. Further, the court did not abuse its discretion in denying defense counsel's request for a hearing. When the district court prompted defense counsel to specify questions that would be explored at the requested hearing, counsel raised questions, with but one exception, concerning only guilt and not drug quantity. Thus, the court acted well within its discretion in denying the request for a hearing.

We have reviewed defendants' remaining arguments on appeal and find them meritless.

APPENDIX A
[Summary Order of The USCA For The Second Circuit]

For these reasons, the judgment of the district court is AFFIRMED.

FOR THE COURT:
ROSEANN B. MACKECHNIE, CLERK

By: _____

THE COURT: Of course.

MR. KATOWITZ: There is an awful lot of correspondence and documentation, and I want to make sure that Mr. Hernandez's every objection is noted the way he wants it noted.

THE COURT: Of course.

MR. KATOWITZ: Thank you.

THE COURT: With respect to the challenge to the guideline calculations on drugs, I gather there are challenges raised by Mr. Hernandez, particularly pro se, as to whether or not the crime was proved. I will hear you further on this if you want, Mr. Katowitz. I know you know the law in this area, that I am bound by the jury's finding.

There is also a question raised, though, about the calculation of the drug quantity and the standard that's applicable to it, whether Apprendi versus New Jersey has any

APPENDIX B
Excerpts From Trial Transcript

role to play is these calculations. The government cites the very recent Circuit decision United States versus Norris, which seems to hold to the contrary. I know that appears at odds with a summary decision in the Williams case but I think Norris is the most recent case law on this point. I'll be happy to hear anyone on the question of drug quantity.

Mr. Fernich, do you want to go first?

MR. FERNICH: Sure, your Honor.

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THE COURT: Please.

MR. FERNICH: Not having seen the letter, I am constrained to agree with the government's position. Norris I believe forecloses the application of Apprendi as a matter of Second Circuit precedent. For the record, however, I did want to point out several things that are observed in Norris which I am sure your Honor has taken due note of.

The argument was termed not frivolous by the Norris court and it was also pointed out in Norris that at least four Supreme Court justices currently support the view that Apprendi should apply to guideline range calculations, i.e. that the presumptive guideline sentence is the equivalent of the statutory maximum.

There are three cases that I'm aware of pending before the Supreme Court this term, the Harris, the Cotton case and the Ring case, that may well resolve this issue this term. So I did want to preserve for purposes of potential Second Circuit or Supreme Court review the argument that A) the presumptive guideline range, which for Mr. Wagner is this case I believe would be 32, if you were just going by the -- I understand your Honor gave a special verdict in the case and there's a one-or-more-kilogram finding.

APPENDIX B
Excerpts From Trial Transcript

In the absence of the drug quantities that the Probation Department is seeking to attribute to Mr. Wagner,

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you would have I believe a 32 range, but with the quantities they're trying to attribute I believe it's 36 or 38. So if Norris is overruled, either sub silentio or explicitly by these Supreme Court precedents, we've got I believe a four-to six-level swing there. So I wanted to preserve that issue in light of these three pending Supreme Court cases this term.

In addition, the other point that Norris makes is the applicable standard of proof to be applied at sentencing, and although this argument too is foreclosed by Norris and the Cordoba-Murdes case, I would advocate for a reasonable doubt finding here by your Honor as to the excess quantities that the Probation Department is seeking to attribute to Mr. Wagner. That, too, I recognize is foreclosed by Norris and Cordoba-Murdes.

Failing that, if your Honor, as I'm sure your Honor will do, as your Honor is bound to do by Second Circuit precedent, applies a preponderance standard here, I would finally advocate for a downward departure under the authority of United States versus Gigante and its progeny, which allows for a downward departure where there are a series of multiple upward adjustments made by a preponderance of the evidence which result in a tail wagging the dog kind of sentence, where you have findings at sentencing being made by a preponderance of the evidence

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which dwarf the findings actually made by a jury beyond a reasonable doubt.

So that would be the only position that I would take here that is not foreclosed by Second Circuit precedent. But with those caveats and with the record thus preserved, that would be Mr. Wagner's position.

APPENDIX B
Excerpts From Trial Transcript

THE COURT: May I ask whether there is any challenge to whether the evidence shows by a preponderance that there is 30 kilograms or more dealt in the conspiracy? I ask that because there was some suggestion in the papers that you might be seeking a hearing even on that point, or perhaps it was Mr. Hernandez who was taking that view, but I want to make sure I know what Mr. Wagner's position is.

MR. FERNICH: Not having been privy to the prior proceedings, I'm going to have to defer to the wisdom of co-counsel as to whether a Fatico hearing is requested or the factual arguments with respect to whether that quantity has in fact been proven by a preponderance of the evidence.

THE COURT: Are you deferring to Mr. Winograd on that or to Mr. Katowitz?

MR. FERNICH: Mr. Winograd.

Excerpts From Trial Transcript

THE COURT: Mr. Winograd, do you want a Fatico hearing on whether –

MR. WINOGRAD: Yes, your Honor.

THE COURT: What would I be holding a hearing on

Appendix C – Decision of the United States Court of Appeals for the Second Circuit [Pages 22a – 24a]

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 17th day of September, two thousand an four,

Present:

Hon. Amalya L. Kearse,
Hon. Sonia Sotomayor,
Circuit Judges.
Hon Laura Taylor Swain,
District Judge.*

UNITED STATES OF AMERICA,

Appellee,

v.

No. 02-1287(L)
No. 02-1288(CON)
No. 02-1507(CON)

JONATHAN WAGNER, DANIEL HERNANDEZ RICHARD MORENO,

Defendants-Appellants.

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* The Honorable Laura Taylor Swain, of the United States District Court for the Southern District of New York, sitting by designation.

Defendants-appellants Jonathan Wagner, Daniel Hernandez, and Richard Moreno have Petitioned for rehearing and rehearing *in banc* based on the Supreme Court's decision in *Blakely v. Washington,* 124 S. Ct. 2531 (2004), and move to stay further proceedings on these petitions pending the Supreme Court's decision in *United States v. Booker,* 375 F.3d 508 (7th Cir. 2004), *cert. granted,* 73 U.S.L.W. 3073, 3074 (U.S. Aug 2, 2004) (No. 04-104), and *United States v. Fanfan,* No. 03-47, 2004 W.L 1713655 (D. Me. June 28, 2004), *cert. granted,* 73 U.S.L.W. 3073, 3074 (U.S. Aug 2, 2004) (No. 04-105).

In *United State v. Mincey,* Nos. 03-1419L, 03-1520, 2004 WL 1794717, at *3 (2d Cir. Aug 12, 2004), we held that "[u]nless and until the Supreme Court rules otherwise, "the law in this Circuit with respect to the United States Sentencing Guidelines remains as stated in our cases prior to *Blakely.* We further noted that we would not reconsider this ruling until after the Supreme Court ruled in *Booker* and *Fanfan. Id.* In accordance with *Mincey,* we **deny** appellants' motion to stay further proceedings pending the Supreme Court's decisions in *Booker* and *Fanfan,* and we **deny** appellants' petitions for rehearing and rehearing *in banc* based on *Blakely.*

The mandate in the instant case, however, will continue to be held pending the Supreme Court's decisions in *Booker* and *Fanfan.* The parties will have until fourteen days following the Supreme Court's decision to file supplemental petitions for rehearing in light of *Booker* and *Fanfan.* Should any party believe there is a need for the district court to exercise jurisdiction prior to the Supreme

APPENDIX C
Decision of the USCA for the Second Circuit

Court's decisions, it may file a motion seeking issuance of the mandate in whole or in part.

FOR THE COURT,
Roseann B. MacKechnie, Clerk

By: s/Lucille Carr

Supreme Court, U.S.
FILED
FEB 28 2005
OFFICE OF THE CLERK

No. 04-1116

In the Supreme Court of the United States

JONATHAN WAGNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

PAUL D. CLEMENT
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Counsel of Record
Department of Justice
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(202) 514-2217

In the Supreme Court of the United States

No. 04-1116

JONATHAN WAGNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner contends that his sentence under the federal Sentencing Guidelines was imposed in violation of the rule announced in *United States* v. *Booker* and *United States* v. *Fanfan*, 125 S. Ct. 738 (2005). In *Booker* and *Fanfan*, this Court held that the Sixth Amendment, as construed in *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), applies to the federal Sentencing Guidelines. *Booker*, 125 S. Ct. at 748-756 (Stevens, J., for the Court). In answering the remedial question in those cases, the Court then applied severability analysis and held that the Guidelines are advisory rather than mandatory, and that federal sentences are reviewable for reasonableness. *Booker*, 125 S. Ct. at 757-769 (Breyer, J., for the Court). Accordingly, the appropriate disposition is to grant certiorari, vacate the judgment of the court of appeals, and remand the case

for further consideration in light of *Booker* and *Fanfan*. The court of appeals can then decide what effect, if any, those decisions have on petitioner's sentence, taking into account any applicable doctrines of waiver, forfeiture, and harmless error.* See *id.* at 769.

PAUL D. CLEMENT
Acting Solicitor General

FEBRUARY 2005

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* The government waives any further response to the petition unless the Court requests otherwise.